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No. 81-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF AKRON,

Petitioner,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF THE COLLEGE OF AMERICAN PATHOLOGISTS IN SUPPORT OF RESPONDENT AKRON CENTER ON THE SIXTH QUESTION PRESENTED

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT—A REQUIREMENT OF "HUMANE" DISPOSAL OF ABORTUS MATERIAL IS VOID FOR VAGUENESS	5
CONCLUSION	10
Appendix	A1

TABLE OF AUTHORITIES

CASES

	PAGE
Akron Center for Reproductive Health v. *City of Akron*, 479 F.Supp. 1172 (N.D. Ohio 1979), *aff'd.*, 651 F.2d 1198 (6th Cir. 1981)	3, 4
Colautti v. *Franklin*, 439 U.S. 379 (1979)	6, 7
Doe v. *Bolton*, 410 U.S. 179 (1973)	7
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	6
Planned Parenthood Assn. v. *Fitzpatrick*, 401 F.Supp. 554 (E.D. Pa. 1975), *aff'd. mem. sub. nom. Franklin* v. *Fitzpatrick*, 428 U.S. 901 (1976)	9
Roe v. *Wade*, 410 U.S. 113 (1973)	7
Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, U.S. , 102 S.Ct. 1186 (1982)	7, 9

STATUTES AND ORDINANCES

Codified Ordinances of the City of Akron, § 1870.16	*Passim*
Codified Ordinances of the City of Akron, § 1870.18	7
Health and Safety Code of California, § 7054.3	8
Health and Safety Code of California, § 25957(a)	8
Mont. Code Ann. § 50-20-105(1)	2
Ohio Admin. Code § 3701-47-01(E)	5
Ohio Admin. Code § 3701-47-05(A)	9
Ohio Rev. Code Ann. § 2923.02(A)(2)	3
Ohio Rev. Code Ann. § 4731.22(B)(18)	6
35 P.S. § 6605(c) (Pennsylvania)	2

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INTEREST OF AMICUS CURIAE

This brief is submitted by the College of American Pathologists on the sixth question presented in the petition for certiorari—whether the Akron ordinance at issue in this case is constitutional insofar as it provides that:

> "Any physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in a humane and sanitary manner."

The brief is being filed with the consent of all parties.[1]

The College of American Pathologists has a special interest in any statute, ordinance, or regulation governing the disposal of abortus tissue. The College is comprised of nearly 8,500 physicians board-certified in the specialty of pathology. As part of their medical practice, some of these physicians are called upon to perform autopsies on aborted fetuses and to analyze embryonic tissue. In these circumstances, the pathologist may be responsible for disposing of the abortus.

With respect to the specific question presented here, the College and its members have a direct stake in whether an ordinance requiring "humane" disposal of the abortus is constitutional. This standard leaves pathologists without meaningful guidance as to whether customary disposal methods comport with law. It exposes pathologists to the risk of prosecution simply because a local official or jury may not regard such methods as "humane."

To be sure, the disposal provision of the Akron ordinance before the Court is directed only to the physician who performs the abortion. If the "humane" standard is upheld in this case, however, that standard can be applied to pathologists. Indeed, existing statutes requiring "humane" disposal are broad enough to cover the pathologist.[2] Moreover, even under the Akron ordinance, a prosecution might be brought against a pathologist on an aiding or abetting

[1] Copies of the consents are printed in the Appendix.

[2] Thus, for example, Pennsylvania law provides that the Department of Health "shall make regulations to provide for the humane disposition of dead fetuses." 35 P.S. § 6605(c). Similarly, Montana law provides that the Department of Health and Environmental Sciences "shall make regulations to provide for the humane disposition of dead infants or fetuses." Mont. Code Ann. § 50-20-105(1).

theory.[3] For all these reasons, the College of American Pathologists offers this brief as amicus curiae.

STATEMENT OF THE CASE

This case involves a broad challenge to the constitutionality of § 1870 of the Codified Ordinances of the City of Akron, a 1978 ordinance which regulates abortions. The only aspect of the ordinance addressed by this brief is § 1870.16. That section requires disposal of the remains of an unborn child in "a humane and sanitary manner."

Respondent Akron Center for Reproductive Health challenged the constitutionality of, *inter alia*, the "humane" disposal requirement of § 1870.16. Both the district court and the Court of Appeals found that this requirement was unconstitutionally vague. *Akron Center for Reproductive Health* v. *City of Akron*, 479 F.Supp. 1172 (N.D. Ohio 1979), *aff'd.*, 651 F.2d 1198 (6th Cir. 1981). The district court concluded that:

> "The appropriate method for Akron's city council to have followed to insure that aborted fetuses are disposed of in a manner that they considered 'humane,' would have been to specifically state what methods of disposal were not or, alternatively, were acceptable. Accordingly, the Court finds Section 1870.16 void for vagueness." 479 F.Supp. at 1206.

The Court of Appeals ruled that the district court had "correctly found section 1870.16 invalid on grounds of vagueness." 651 F.2d at 1211. It noted that the "possibility that the language of section 1870.16 might be construed to mandate some sort of 'decent burial' of an embryo at the

[3] Ohio Rev. Code Ann. § 2923.02(A)(2) provides that "(n)o person, acting with the kind of culpability required for the commission of an offense shall . . . aid or abet another in committing the offense."

earliest stages of formation is too real to be overlooked." *Id.*

This Court granted certiorari to review a number of issues decided by the Court of Appeals. The sixth question presented to this Court was "(w)hether the term 'humane' as it relates to the disposal of fetuses in Section 1870.16 is void for vagueness, and if so, whether the term is severable from the balance of the section. . . ." It is to that question that this brief is addressed.

SUMMARY OF ARGUMENT

Section 1870.16 is void for vagueness insofar as it requires "humane" disposal of the abortus. It sets forth no objective standard by which physicians can determine whether the disposal methods that they use, *i.e.*, group burial or cremation, comport with law. Instead, § 1870.16 exposes physicians to prosecution and possible conviction because local officials and juries may believe that these methods are not "humane"—or simply because they wish to punish all who are in any way connected with an abortion.

The vagueness of the "humane" disposal standard is particularly intolerable for several reasons. The requirement threatens to inhibit the exercise of privacy rights protected by the Fourteenth Amendment by burdening a woman's decision to have a lawful abortion. In addition, it exposes the physician not just to civil penalties, but to the extreme sanction of criminal conviction. Moreover, it does so even if the physician had no intent to violate the law. For these reasons, the "humane" disposal requirement of § 1870.16 violates due process of law as guaranteed by the Fourteenth Amendment.

ARGUMENT

A REQUIREMENT OF "HUMANE" DISPOSAL OF ABORTUS MATERIAL IS VOID FOR VAGUENESS

Abortus material is frequently sent to a hospital laboratory for evaluation by the pathologist. Examination of the abortus by a pathologist can yield information useful both in counseling the parents and in advancing medical science. In the case of a spontaneous abortion, examination may indicate the cause of the abortion and thus may suggest the risks of, and precautions to be followed in, any subsequent pregnancies. In the case of an abortion induced out of fear of a genetic or other developmental defect, examination can determine whether or not the perceived defect actually existed. Thus it can be of significance in determining the reliability of pre-natal tests and in providing information on the risks inherent in subsequent pregnancies. Whenever the abortus material is abnormal, examination can help ascertain the etiology of the abnormality and thus contribute to an understanding of disease.

After examination by the pathologist has taken place, the abortus must be disposed of. Where it is still an embryo,[4] the abortus is treated like any other tissue removed from the human body through amputation, excision, or biopsy. Specifically, it is held in the laboratory for some period of time, then discarded, and subsequently either incinerated or buried with other refuse.

Where the abortus is a fetus, the parents may make arrangements for private burial. If they do, the fetus will be

[4] In most states, a conceptus is regarded as an embryo for approximately the first twenty to twenty-two weeks of gestation, depending on state law. Thereafter, the embryo has developed sufficiently to be regarded as a fetus. Under Ohio law, a conceptus is considered an embryo only for the first fourteen weeks. Ohio Admin. Code § 3701-47-01(E).

held in the hospital until picked up by the authorized agent. If the parents choose not to make arrangements, the hospital arranges for disposal. Generally, disposal is accomplished either by burial or cremation. A number of fetuses will be buried in a single casket or cremated at the same time.

Amicus College of American Pathologists believes that these procedures are humane. They allow the parents to make whatever arrangements they wish. At the same time, these procedures provide for efficient disposal of the abortus in a manner commensurate with the level of fetal development.

Section 1870.16, however, sets no objective standard by which a physician can readily determine whether these commonly used procedures comport with law. It "may trap the innocent by not providing fair warning." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). The "humane" disposal requirement exposes physicians to prosecution and other sanctions[5] because local officials and juries may not regard group burial or cremation of fetuses as humane—or simply because they wish to punish all who are in any way connected with an abortion. In other words, it impermissibly delegates basic policy matters to prosecutors, judges, and juries "for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 109. Thus, § 1870.16 offends the Constitution, for it is "a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Id.* at 108. See *Colautti* v. *Franklin*, 439 U.S. 379, 390 (1979).

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[5] Under Ohio law, the state medical board may revoke or suspend a physician's license for violating "any abortion rule adopted by the public health council. . . ." Ohio Rev. Code Ann. § 4731.22 (B) (18).

Most relevant in this connection is the recent observation by this Court that "(t)he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depend on the nature of the enactment." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, U.S. , 102 S.Ct. 1186, 1193 (1982). Here, the "nature of the enactment" underscores the unconstitutionality of § 1870.16.

As the Court pointed out in *Hoffman Estates*, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." 102 S.Ct. at 1193. A requirement of "humane" disposal of the abortus "threatens to inhibit the exercise of" privacy rights protected by the Fourteenth Amendment. See *Roe* v. *Wade*, 410 U.S. 113 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (1973). Specifically, the only method of disposal that would unquestionably satisfy the "humane" standard is an individual funeral for each abortus. The high costs of that approach would surely affect a woman's decision to have an abortion. Moreover, the vagueness of the "humane" disposal requirement might deter physicians from performing abortions. This development would, of course, burden the decision concerning an abortion.

Other features of § 1870.16 also point to the conclusion that the "humane" disposal requirement is unconstitutionally vague. A lesser degree of vagueness is tolerated where a law provides for criminal penalties. *Hoffman Estates, supra*, 102 S.Ct. at 1193. Noncompliance with § 1870.16 is a criminal offense punishable as "a misdemeanor of the third degree . . ." Codified Ordinances of the City of Akron, § 1870.18. The absence of a scienter requirement acerbates matters still further. *Hoffman Estates, supra*, 102 S.Ct. at 1193; *Colautti, supra*, 439 U.S. at 395. Section 1870.16 con-

tains no requirement of *mens rea* or intent to violate the law. The prescribed penalty attaches simply upon disposal of the abortus in a manner subsequently determined not to be "humane." In sum, § 1870.16 is void for vagueness insofar as it requires "humane" disposal of abortus material.

The City of Akron advances three arguments to support a contrary conclusion. First, it indicates that the intent of § 1870.16 is merely "to preclude the mindless dumping of aborted fetuses on garbage piles." Brief for Petitioner (Pet. Br.), at 48. This argument only points up the constitutionally unacceptable vagueness of the ordinance. If Akron wants to prohibit "dumping of aborted fetuses on garbage piles," it can—as both the district court and Court of Appeals suggested—easily write an ordinance to that effect. Alternatively, it can provide that abortus material must be disposed of either by burial or incineration. Indeed, the State of California has done precisely that.[6] A more tightly-drawn ordinance would accomplish Akron's objective while avoiding the vagueness problems inherent in the "humane" disposal standard.

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[6] Section 7054.3 of the Health and Safety Code of California, West's Ann. Health and Safety Code § 7054.3, provides that "(n)otwithstanding any other provision of law, a recognizable dead human fetus of less than 20 weeks uterogestation not disposed of by interment shall be disposed of by incineration." Similarly, § 25957(a) of the Health and Safety Code, West's Ann. Health and Safety Code § 25957(a), provides as follows:

> "... at the conclusion of any scientific or laboratory research or any other kind of experimentation or study upon fetal remains, such fetal remains shall be promptly interred or disposed of by incineration.
>
> Storage of such fetal remains prior to the completion of the research, experimentation, or study shall be in a place not open to the public, and the method of storage shall prevent any deterioration of the fetal remains which would create a health hazard."

Second, the City suggests that the "humane" disposal requirement was upheld in *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F.Supp. 554, 573 (1975), *aff'd. mem. sub nom. Franklin* v. *Fitzpatrick*, 428 U.S. 901 (1976). Pet. Br. at 48. In fact, however, the statute at issue there provided only that the State Department of Health "shall make regulations to provide for the humane disposal of dead fetuses." As the district court pointed out in that case, the provision in question was "merely an enabling statute." 401 F.Supp. at 573. It imposed no obligation on private parties until the Department issued regulations. Accordingly, the court held that any challenge to the constitutionality of the "humane" disposal requirement should await the issuance of regulations. *Id.* Here, by contrast, the Akron ordinance directly affects regulated parties. It is operative even without the issuance of regulations. Thus the vagueness problems that it presents are not avoided, but rather exacerbated, by the absence of regulations.[7]

Finally, the City asserts that its ordinance is not void for vagueness because it "was largely taken from a state regulation which provides that 'the fetus shall be disposed of in a humane manner.' " Pet. Br. at 48. The City's conclusion does not follow from the point it makes. If anything, reliance on the Ohio regulation undercuts the City's position. For that regulation fails to define the meaning of the term "humane."[8] It leaves regulated parties without any guidelines whatsoever.

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[7] Significantly, Akron has not issued any regulations limiting the term "humane" and does not appear to have a mechanism for publishing any regulations. See *Hoffman Estates, supra*, 102 S.Ct. at 1193.

[8] The regulation states only that "(t)he fetus shall be disposed of in a humane manner." Ohio Admin. Code § 3701-47-05(A).

The City of Akron has offered nothing to alter the conclusion that a requirement of "humane" disposal of abortus material is void for vagueness. Perhaps recognizing this, the City concludes that the "humane" disposal requirement might be severed from the portion of the ordinance providing for sanitary disposition of abortus material. Amicus College supports this approach. The requirement of sanitary disposal is both understandable and proper.

CONCLUSION

For the foregoing reasons, amicus College of American Pathologists suggests that the judgment of the Court of Appeals be affirmed insofar as it holds that the requirement of "humane" disposal of abortus material in § 1870.16 is void for vagueness.

Respectfully submitted,

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July 29, 1982

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Dear Mr. Bierig:

On behalf of Akron Center for Reproductive Health Inc., et al., I consent to the filing of an *amicus curiae* brief on behalf of the College of American Pathologists in *Akron Center for Reproductive Health* v. *City of Akron*, U.S. Nos. 81-746; 81-1172.

Sincerely,

/s/ Stephan A. Landsman
Counsel of Record
On behalf of Akron
Center for Reproductive
Health, Inc.

July 30, 1982

Marc Baum
Sidley & Austin
1 First National Plaza
Chicago, Illinois 60603

Re: Akron Center for Reproductive Health
v. City of Akron
Nos. 81-746 & 81-1172

Dear Mr. Baum:

As attorney for Patricia K. Black and Francois Seguin, M.D., respondents in the above-captioned case now pending in the United States Supreme Court, I hereby consent to the participation in this case by the College of American Pathologists as amicus curiae.

Very truly yours,

/s/ Alan G. Segedy
of Segedy & Umbaugh
On behalf of Patricia K.
Black and Francois
Seguin, M.D.

August 6, 1982

Jack R. Bierig
c/o Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

Dear Mr. Bierig:

In response to your organization's request to file an amicus brief in Case No. 81-746 and/or 81-1172, Supreme Court of the United States, and in accordance with Supreme Court Rule 36(2), consent is hereby given for your organization to file a brief of amicus curiae.

Opposing counsel and the undersigned have agreed that consent could be given to any organization desiring to file an amicus curiae brief, on either side of the issues. If consent of counsel for the opposing party is denied, please notify the undersigned immediately.

Finally, please be sure to serve a copy of your brief upon counsel for all parties.

Very truly yours,

/s/ Robert D. Pritt
Director of Law
City of Akron
On behalf of City of
Akron